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No. 84-754

IN THE

Supreme Court of the United States

October Term, 1984

CITICORP,

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

—and—

BANK OF BOSTON CORPORATION, THE STATE OF RHODE ISLAND, and RIHT FINANCIAL CORPORATION,

Intervenor-Respondents.

CITICORP,

Petitioner,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent,

—and—

FLEET FINANCIAL GROUP, INC.,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF INTERVENOR-RESPONDENT FLEET FINANCIAL GROUP, INC. IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

1. Does Section 3(d) of the Bank Holding Company Act (12 U.S.C. §1842(d)), which explicitly provides for unqualified deference to state laws authorizing interstate bank acquisitions, permit a state to adopt legislation allowing the acquisition of banks within its borders by bank holding companies located in specified other states adopting similar legislation?

2. Is such state legislation, enacted under the authority expressly granted by Congress in Section 3(d) of the Bank Holding Company Act, consistent with the Compact Clause of the Constitution?

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Respondent Fleet Financial Group, Inc., which was an intervenor in the court below, submits this brief in opposition to the petition for certiorari filed by Citicorp ("Petition").[1]

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1. Fleet Financial Group, Inc. has no parent company, no affiliates, and no partly owned subsidiaries.

STATEMENT OF THE CASE

Fleet Financial Group, Inc. ("Fleet"), a Rhode Island bank holding company, applied to the Federal Reserve Board ("Board") in May 1984 for permission to acquire two newly established national banks. One of these new banks, to be located in Hartford, Connecticut, was to be acquired pursuant to Connecticut's interstate banking law, 1983 Conn. Acts 83-411 ("Connecticut Act"). The other new bank, planned for Boston, Massachusetts, would be acquired under the authority of Mass. Gen. Laws Ann. ch. 167A §2 (West 1984) ("Massachusetts Act").

The Board approved Fleet's application on October 4, 1984. (Petition, Appendix D.) In its order, the Board noted that while Fleet's application raised the same legal issues that the Board had addressed in three earlier rulings, the Board's decisions in those rulings approving interstate acquisitions pursuant to the Connecticut Act and the Massachusetts Act had since been upheld by the United States Court of Appeals for the Second Circuit. (See Petition, Appendix D, 21-22.) On that basis, the Board approved Fleet's acquisition of the two *de novo* banks.

After Citicorp filed a petition for review of the Board's order by the Second Circuit, Fleet, Citicorp and the Board entered into a stipulation regarding the case. The stipulation, reprinted as Appendix B to the Petition, reflects the acknowledgement by the parties that this case raises the same issues as those previously decided by the Second Circuit in *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 740 F.2d 203 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3189 (U.S. Sept. 25, 1984) (No. 84-363) ("Northeast").

Contrary to the implication in the Petition (Petition, 8), however, Fleet did not agree in the stipulation that review of this case by this Court is warranted, nor did it agree to stay the consummation of its proposed transactions pending review of this case by this Court. Rather, Fleet agreed to postpone its acquisition of its two new banks only until this Court disposes of the *Northeast* case. It continues to be

Fleet's position, as stated *infra*, that neither the *Northeast* case nor this case warrants review by this Court.

The Second Circuit, based on the parties' stipulation, affirmed the Board's order but stayed its mandate pending this Court's disposition of *Northeast*. The stay will be vacated and the Second Circuit's mandate issued immediately if (a) the petition for certiorari in *Northeast* is denied, (b) the Second Circuit's judgment in *Northeast* is affirmed, or (c) the stay of the mandate of the Second Circuit in *Northeast* is vacated by this Court.

REASONS FOR DENYING THE PETITION

The Petition should be denied for the reasons stated in the several briefs in opposition filed in *Northeast*, particularly the brief of the Solicitor General in opposition to the petition in that case. As stated in those briefs in opposition, the decisions of the Second Circuit in the present case and in *Northeast* are consistent with both the legislative history[2] and the prior judicial interpretation[3] of the Douglas Amendment,[4] the federal statute at the heart of this case. Far from encroaching on the supremacy of the United States, the Connecticut Act and Massachusetts Act represent exercises of an authority granted to the states by Congress and hence present no important question under the Compact Clause. There is no conflict among the courts of appeals regarding the proper resolution of the questions presented.

In supplementing the oppositions already filed in *Northeast*, Fleet wishes to emphasize two points. First, the Petition presents no issue under the Commerce Clause. There is no dispute in this case regarding the authority of Congress to permit the states to regulate interstate commerce in ways that would not be permissible absent such congressional approval. *South-Central Timber Dev., Inc. v. Wunnicke*, 52 U.S.L.W. 4631 (U.S. May 22, 1984) (No. 82-

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2. *See* Solicitor General's Opposition to Certiorari in *Northeast*, at 6-10.

3. *Iowa Independent Bankers v. Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975).

4. Section 3(d) of the Bank Holding Company Act, 12 U.S.C. §1842(d).

1608), at 4632; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). Congress has taken just such a step in adopting the Douglas Amendment, which provides in relevant part that the Board may approve interstate acquisitions of banks by bank holding companies in any case in which such an acquisition "is specifically authorized by the statute laws of the State in which such bank is located. . . ." 12 U.S.C. §1842(d).

The only question presented by this petition is one of statutory interpretation: Do the Connecticut Act and the Massachusetts Act fall within the scope of the authority delegated to the states in the Douglas Amendment? *Cf. Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 652-653 (1981) (congressional grant of authority to the states, under McCarran-Ferguson Act, removed Commerce Clause limitations on state regulation of insurance business and left as the only issue whether actions taken by a state were consistent with the Act). This question, correctly answered in the affirmative by the Second Circuit, does not warrant review by this Court, particularly in the absence of any conflict among the courts of appeals.

Second, the letter of Representative Rodino, quoted at length in the Petition (Petition, 9-11), merely highlights one of the reasons that this petition should be denied. As the letter makes clear, in its term just ended, Congress considered the adoption of federal legislation that would have given specific approval to regional interstate banking statutes such as the Connecticut Act and the Massachusetts Act. While Mr. Rodino certainly appears to have opposed the enactment of such a law, the sentiments of his colleagues in the House of Representatives were never tested on this point. The proposal, embodied in a bill approved by the Senate by a vote of 89 to 5, was never brought to a vote in the House.

The Senate bill (S. 2851), an omnibus banking regulation, included provisions dealing not only with interstate banking but also with securities and insurance powers of banks and bank holding companies, permissible activities of savings and loan holding companies, the payment of interest on

certain reserves maintained with the Federal Reserve, brokered deposits, "non-bank" banks, and other topics. The failure of Congress to enact this comprehensive banking legislation, of which the interstate banking provision was only one of many elements, does not in any way support Citicorp's conclusion that the Second Circuit erred in its interpretation of the Douglas Amendment. Rather, this topic, like so many others having to do with the banking industry, is unfinished congressional business that may be addressed in the next session of Congress. As noted in the Solicitor General's opposition to the petition in *Northeast*, the current congressional interest in revising the legislation that this Court would be construing if it reviewed the Second Circuit's decision counsels denial of the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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